

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6142

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE HARTFORD PROVISION COMPANY,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

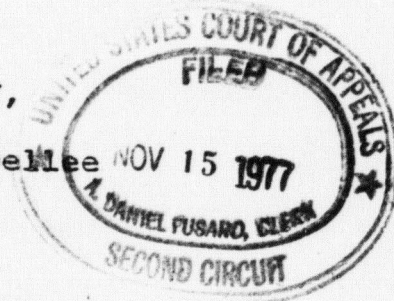
APPENDIX

M. CARR FERGUSON,
Assistant Attorney General,

GILBERT E. ANDREWS,
CROMBIE J. D. GARRETT,
AARON ROSENFELD,
Attorneys,
Tax Division,
Department of Justice,
Washington, D. C. 20530.

Of Counsel:

RICHARD BLUMENTHAL,
United States Attorney.



B
P/S

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	Page
Docket Entries-----	1
Stipulation of Facts-----	3
Memorandum of Decision-----	13
Judgment-----	18

#B-76-89 Hartford Provision Co v. USA

#B-76-89

DATE	NR.	PROCEEDINGS
3/22	1	Complaint, filed.
3/22	2	Civil Cover Sheet, filed.
3/22	3	Appearance of John J. Graubard, Esq., and David M. Cohen, Esq., entered for Pltf.
3/22		Summons issued, and together with attested copies thereof and copies of complaint, Form 285(1), forwarded Marshal for service.
3/26	4	Marshal's return showing service, filed. -Summons/Complaint. (Cert.Mail #455254, 3/24/76, to Atty.Genl., Wash.D.C.)
4/1		Cert.Mail Retn.Rcpt.#455254, filed.--A.Newton.
5/24	5	Answer, filed.
5/26		Placed on Trial List. Notice to Counsel re Trial List sent Counsel of record.
11/8/76	6	Motion For Summary Judgment, filed by pltf.
11/8	7	Affidavit of Ralph Lotstein, filed.
11/8	8	Affidavit of Joseph A. Rubara, filed.
11/8	9	Brief In Support Of Plaintiff's Motion For Summary Judgment, filed.
11/24	10	Defendant's Motion For Continuance, filed.
11/24	11	Memorandum In Support Of Defendant's Motion For Continuance, filed.
11/29		Deft's Motion for Continuance, endorsed: Motion granted. Newman, J. M-11/30/76. Copies to counsel. (No. 10)
11/30	12	Answer To Defendant's Motion For Continuance, filed.
12/8	13	Notice to Take Depositions of ELLA MAE HARDING, KENNETH HUNGERFORD and JOSEPH RUBERA on Dec. 14, 1976 at 1:00 p.m. at office of U.S. Atty., Hartford, Conn., filed by deft.
12/15	14	Marshal's return showing service, filed. - Subpoena (Ella Mae Harding, 12/10/76 Kenneth Hungerford, 12/10/76; Joseph Rubera, 12/9/76)
1977 3/7	15	Deposition of Kenneth Hungerford, filed.
3/7	16	Deposition of Ella Mae Harding, filed.
3/14	17	Stipulation Of Facts, upon which case may be decided, filed by parties.
3/23	18	Ltr.dtd. 3/11,1977, from Atty.Graubard setting forth agreed briefing schedule re Stipulation Of Fact (#17), simultaneous briefs on or before Apr.15,1977, reply briefs on or before May 2,1977, oral argument thereafter if requested by parties, endorsed: "So ordered." NEWMAN, J. M-3/24/77. Copies to counsel.
4/13	19	Plaintiff's Brief, filed.
4/19	20	Defendant's Cross-Motion For Summary Judgment, filed.
4/19	21	Brief In Support Of Defendant's Cross-Motion For Summary Judgment, filed.
4/27	22	Plaintiff's Reply Brief, filed.
5/2	23	Reply Brief For Defendant IN Opposition To Plaintiff's Motion For Summary Judgment, filed.
5/10		Hearing held on Cross Motions For Summary Judgment. DECISION RESERVED. Newman, J. (Gale, R; Rowe, DC)
5/12		Court Reporter's Notes of proceedings held May 10, 1977, filed at New Haven. (Gale, R)

CIVIL DOCKET CONTINUATION SHEET

FPI. 81-3-16-73-50R-3511

PLAINTIFF		DEFENDANT	DOCKET NO. <u>B-76-89</u>
HARTFORD PROVISION CO.		THE U.S. OF A.	PAGE <u>2</u> OF <u> </u> PAGES
DATE	NR.	PROCEEDINGS	
7/5	24	MEMORANDUM OF DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT, entered. Pltf.'s Motion GRANTED and def't's Motion DENIED. Judgment may enter for pltf. in amount of \$6,066.00 and def't. is ordered to return that amount to pltf, with interest calculated at 6 per cent per annum from Mar.13, 1975, to the date of*this judgment. NEWMAN, J. M-7/5/77. Copies sent counsel, Judges, Magistrates, U. Conn. Law Rev.*payment	
7/5	25	JUDGMENT, entered. Judgment entered in favor of pltf in amount of \$6,066.00 with interest at 6 % p.a. from Mar. 13, 1975 to the date of payment of this judgment. Markowski, C. M-7/5/77. Copies to counsel.	
8/19	26	Notice of Appeal, filed by def't. Copies to Attys. Graubard, Cohen and A.U.S.A. Sweigart.	
8/22		Civil Appeals Management Plan and Forms C and D forwarded to A.U.S.A. Sweigart.	
8/22		Certified copies of Notice of Appeal and Docket Entries sent Clerk, U.S. Court of Appeals.	

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

THE HARTFORD PROVISION CO.,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO. B-76-89
	)	
UNITED STATES OF AMERICA,	)	
	)	[Filed March 14, 1976]
Defendant	)	

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by the parties hereto, by their respective counsel, that the facts contained herein are true and the documents contained herein are true and correct copies; without stipulating that any particular fact or document is relevant.

1. On December 12, 1974, the plaintiff, The Hartford Provision Co. (hereinafter "Provision") obtained an order to garnish the goods, effects and estate of the taxpayer, Thomas H. Hall Associates, Inc. (hereinafter "Hall") held by the Community Renewal Team of Greater Hartford, Inc. (hereinafter "CRT"). The writ of garnishment was served on Community Renewal on December 17, 1974. On this date CRT was indebted to Hall in the amount of \$6,066.16.

2. On January 31, 1975, Provision obtained a judgment against Hall in the Superior Court of the State of Connecticut within and for Fairfield County in the amount of \$15,705.02, plus costs of \$143.40.

3. Also on January 31, 1975, CRT established an account with the Connecticut Bank and Trust Company "CRT-Thomas Hall Associates Creditors Account" No. 181-703-5,

and deposited the amount of \$6,066.16 in this account. The amount deposited represented funds owed by CRT to Hall.

4. On February 24, 1975, the Internal Revenue Service made an assessment against the taxpayer, Hall, in the amount of \$6,889.21, representing withholding and social security taxes due from Hall for the third quarter of 1974. On March 6, 1975, Notice of the Federal Tax Lien was filed with the Secretary of the State of Connecticut, and with the Town Clerk, Bloomfield, Connecticut. A copy of the Federal Tax Lien is attached hereto as Exhibit A.

5. On March 4, and March 7, 1975, Provision, through Deputy Sheriff Joseph A. Rubera, attempted to serve on CRT a writ of execution issued by the Superior Court on February 19, 1975, in order to have the funds owed by CRT to Hall paid over to Provision in partial satisfaction of the judgment obtained against Hall. A copy of the writ of execution is attached hereto as Exhibit B.

6. Actual service of the writ of execution was not effectuated until March 25, 1975, when the writ of execution was served on Robert Satter, attorney for CRT.

7. On March 7, 1975, the Internal Revenue Service served a notice of levy on the Connecticut Bank and Trust Company, seeking to have the funds held in the CRT account No. 181-703-5 paid over to the Internal Revenue Service in satisfaction of the tax assessment made against Hall. A copy of the notice of levy is attached hereto as Exhibit C.

[-3-]

8. In response to the notice of levy, the Connecticut Bank and Trust Company paid over to the Internal Revenue Service \$6,066.00, by check dated March 13, 1975.

9. By letter dated June 13, 1975, Provision, through its attorney, requested that the funds paid to the Internal Revenue Service by the bank be paid to Provision since it had a superior claim to the funds. A copy of the letter is attached hereto as Exhibit D.

10. The Internal Revenue Service having refused Provisions' request, the instant action was timely instituted on March 22, 1976.

By:

Attorney for Plaintiff

By:



Attorney for Defendant

U.S. DEPARTMENT OF THE TREASURY
 OFFICE OF FEDERAL TAX LIAISON
 DISTRICT OFFICE
 Hartford, Connecticut

U.S. DEPARTMENT OF THE TREASURY
 INTERNAL REVENUE SERVICE
 TAX LIEN UNDER INTERNAL REVENUE LAWS
 SERIAL NUMBER
 0501-75-2303

For Optional Use By the District Office

Pursuant to the provisions of Sections 6321, 6322, and 6323 of the Internal Revenue Code, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer.

NAME OF TAXPAYER

Thomas H. Hall Associates Inc. a corporation

RESIDENCE

251 Tunnis Ave., Westfield, Ct. 06002

KIND OF TAX (a)	TAX PERIOD ENDED (b)	DATE OF ASSESSMENT (c)	IDENTIFYING NUMBER (d)	UNPAID BALANCE OF ASSESSMENT (e)
941	09/30/74	02/24/75	06-0902415	6,839.21

PLACE OF FILING

Secretary of State, Hartford, Connecticut

RECEIVED
 DIST. DIR. OF INT. REV.
 TOTAL \$ 6,839.21

WITNESS my hand at Hartford, Connecticut

MAR 21 1975 on this

the 6th day of March 19 75

SPECIAL PROCEDURES
 SECTION
 HARTFORD

SIGNATURE Thomas G. George TITLE
 Thomas G. George Group Manager

(NOTE: Consent of officer authorized by law to take acknowledgments is not essential to the validity of Notice of Federal Tax Lien G.C.M. 25419, C.B. 120-31, 123.)

PART 2-To be receipted and returned to the Internal Revenue Service

EXHIBIT A

No. _____

UNITED STATES

VS.

NOTICE OF TAX LIEN

Filed this _____ day of
MAR 6 1973 1-30 PM
 19____, at _____ m.

[Signature]
 Clerk (or Registrar).

FD-648 (REV. 7-74)

EXCERPTS FROM INTERNAL REVENUE CODE

SEC. 6321. LIEN FOR TAXES

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323. VALIDITY AND PRIORITY AGAINST CERTAIN PERSONS.

(a) PURCHASERS, HOLDERS OF SECURITY INTERESTS, MECHANIC'S LIENORS, AND JUDGMENT LIEN CREDITORS.—The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof has been filed by the Secretary or his delegate.

(b) PROTECTION FOR CERTAIN INTERESTS EVEN THOUGH NOTICE FILED.—Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid—

(1) PLACE FOR FILING NOTICE: FORM.—

(i) Place For Filing.—The notice referred to in subsection (a) shall be filed—

(A) Under State Laws.—

(i) Real Property.—In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal Property.—In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; or

(B) With Clerk Of District Court.—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) With Recorder Of Deeds Of The District Of Columbia.—In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(2) Situs Of Property Subject To Lien.—For purposes of paragraph (1), property shall be deemed to be situated—

(A) Real Property.—In the case of real property, at its physical location; or

(B) Personal Property.—In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed. For purposes of paragraph (2)(B), the residence of a cor-

poration or partnership shall be the principal office in which the principal activity of such corporation or partnership is conducted, and the residence of an individual shall be his residence without the United States shall be deemed to be in the District of Columbia.

(3) FORM.—This form and content of a notice referred to in subsection (a) shall be prescribed by the Secretary or his delegate. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

(f) REFILING OF NOTICE.—For purpose of this section—

(1) GENERAL RULE.—Unless notice of lien is refilled in the manner prescribed in paragraph (2) during the required refiling period, such notice of lien shall be treated as filed on the date on which it is filed (in accordance with subsection (f)) after the expiration of the refiling period.

(2) PLACE FOR FILING.—A notice of lien referred to in subsection (a) shall be effective only—

(A) if such notice of lien is refilled in the office in which the prior notice of lien was filed; and

(B) in any case in which, 60 days or more prior to the date of a refiling of notice of lien under subparagraph (A), the Secretary or his delegate received information (in the manner prescribed in regulations issued by the Secretary or his delegate) concerning a change in the taxpayer's residence, if a notice of such lien is also filed in accordance with a subsection of the State in which such residence is located.

(3) REQUIRED REFILING PERIOD.—In the case of any notice of lien, the term "required refiling period" means—

(A) the one-year period ending 30 days after expiration of 6 years after the date of the assessment of the tax; and

(B) the one-year period ending with the expiration of 6 years after the close of the preceding required refiling period for such notice of lien.

(4) DISCLOSURE OF AMOUNT OF OUTSTANDING LIEN.—If a notice of lien has been filed pursuant to section (1), the Secretary or his delegate is authorized to provide by regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

SEC. 6325. RELEASE OF LIEN OR DISCHARGE OF PROPERTY.

(a) RELEASE OF LIEN.—Subject to such regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of the lien imposed with respect to any internal revenue tax.

(1) Liability Satisfied or Unenforceable.—The Secretary or his delegate finds that the liability for the tax assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable, or

(2) Bond Accepted.—There is furnished to the Secretary or his delegate and accepted by him a bond, as a condition upon the payment of the amount assessed, together with all interest in respect thereof, with the terms, conditions, and form of the bond and thereon, as may be specified by such regulations.

To the Sheriff of the County of Hartford,
either of the Constables of the Town of Bloomfield,
within said County, - GREETINGS:

Whereas, THE HARTFORD PROVISION COMPANY, STAMFORD DIVISION, INC.

on the 31st day of January, 1975, recovered judgment against

THOMAS H. HALL ASSOCIATES, INC.

before the Superior Court of Connecticut, holden at Stamford, within
and for the County of Fairfield, for the sum of
Fifteen Thousand Seven Hundred Five dollars and
Two cents, damages, and One Hundred Forty Three
dollars and Forty cents,
costs of suit, as appears of record, whereof execution remains to be done.

These are, therefore, by authority of the State of Connecticut, to command you, that of the goods
or lands of the said THOMAS H. HALL ASSOCIATES, INC.

within your precincts, you cause to be levied (the same being disposed of, or appraised, as the law
directs), paid and satisfied unto the said THE HARTFORD PROVISION COMPANY, STAMFORD
DIVISION, INC.

the aforesaid sums, being Fifteen Thousand ~~dollars and~~ Eight Hundred Forty Eight
dollars and Forty Two cents, in the whole, ~~and the costs of suit, as appears of record, whereof execution remains to be done.~~

By the Court:

19th day of February, 1975

and thereof also to satisfy yourself for your own fees.

HEREOF FAIL NOT, and make due return of this writ, with your doings thereon, according to
law, within sixty days next coming.

Dated at Stamford, Connecticut this 19th day of February, 1975

Arthur J. B...

FILED
1975 FEB 20 PM 2:10
CLERK OF SUPERIOR COURT
HARTFORD, CONNECTICUT

NOTICE OF LEVY



ORIGINATING DISTRICT

HARTFORD, CONN

CONN BANK TRUST CO
1 CONSTITUTION Plaza
Hartford Conn

L. [unclear] Liens Attached.
State of Conn. HRT-2 Conn
Hartford Conn

You are hereby notified that there is now due, owing, and unpaid to the United States of America, from the taxpayer whose name appears below the sum of \$ 7015.13

KIND OF TAX	TAX PERIOD ENDED	DATE OF ASSESSMENT	IDENTIFYING NO.	UNPAID BALANCE OF ASSESSMENT	STATUTORY ADDITIONS	TOTAL
941	07-10-74	02-24-75	14-0902710	\$6,871.21	\$ 60.76 FTR \$3.91 INT 11.25 LFE	\$ 7015.13
TOTAL AMOUNT DUE						\$ 7015.13

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or the such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

<i>[Signature]</i> John W. [unclear] Jr. Tel. 244-1326	TITLE Revenue Officer	ADDRESS (CITY AND STATE) Hartford, Conn
(Name and Address of Taxpayer) Thomas H. Huff Assoc. Inc. [unclear] rather Account of Community [unclear] Team of [unclear] Hartford Conn 127 Mya St Hartford, Conn L. [unclear] Account # 181705-13		
CERTIFICATE OF SERVICE I hereby certify that this notice of levy was served by delivering a copy of it to the person named below. NAME Wm. V. Fontana TITLE Vice Pres. DATE AND TIME 5/2/75 4:55 PM SIGNATURE OF REVENUE OFFICER OR SERVICE REPRESENTATIVE <i>[Signature]</i>		

PART 1 - TO BE RETURNED TO INTERNAL REVENUE SERVICE

FORM 665-A (7-73)

EXHIBIT C

BEST COPY AVAILABLE

OFFICES
WOFSEY, ROSEN, KWESKIN & KURIANSKY

ABRAHAM WOFSEY, 1915-1944
MICHAEL WOFSEY, 1927-1957
DAVID M. ROSEN, 1928-1967

SYDNEY C. KWESKIN
JULIUS B. KURIANSKY
SAUL KWARTIN
MONROE SILVERMAN
EMANUEL MARCOLIS
HOWARD C. KAPLAN

EMIL H. FRANKEL
JOHN J. CHAUDARD
HENRY L. GOLDSTEIN
EDWARD M. KWESKIN

777 SUMMER STREET
STAMFORD, CONN. 06901
327-2300 AREA CODE 203

FILE NO.

June 13, 1975

RECEIVED

6 JUN 20 1975
DIST. DIV. 117. P. 1
HARTFORD

District Director
Internal Revenue Service
450 Main Street
Hartford, Connecticut

Attention: Chief, Special Procedures Staff

Gentlemen:

Please consider this letter as a formal request by The Hartford Provision Company, Stamford Division, Inc., of 159 Main Street, Stamford, Connecticut, for the return of property wrongfully levied upon pursuant to §6343(b) of the Internal Revenue Code.

The levy in question was made on March 7, 1975 upon an account at Connecticut Bank and Trust Company entitled "Thomas H. Hall Associates, Creditors' Account" and opened by the Community Renewal Team of Greater Hartford, Inc. Said levy resulted in the payment of \$6,066.15 by the bank to the Internal Revenue Service on March 11, 1975. The taxpayer involved was Thomas H. Hall Associates, Inc., 294 Tunxis Avenue, Bloomfield, Connecticut. As our client was not served with a copy of the Notice of Tax Lien, Notice of Levy or Levy, we do not know the date of these documents, but it has been reported that the notice of tax lien was filed on March 6, 1975 both in the Secretary of the State's office in Hartford and in the office of the Bloomfield Town Clerk. We have also been informed that the Revenue Officer handling this matter is John W. Askintowicz, Jr., of the Hartford district, so we would infer that this is the originating district.

EXHIBIT D

WOFSEY, ROSEN, KWESKIN & KURIANSKY

District Director
Internal Revenue Service
June 13, 1975
Page Two

The basis of our client's claim in and to the property levied upon is as follows: Thomas H. Hall and Associates, Inc. ("Hall") was on December 12, 1974 owed in excess of \$13,900 to The Hartford Provision Company, Stamford Division, Inc. ("HPC") for food products sold on open account. On that date, pursuant to the provisions of Connecticut law and based on the admitted insolvency of Hall, HPC obtained an ex parte order from the Superior Court of the State of Connecticut within and for Fairfield County at Stamford (Levine, J.), permitting the garnishment of up to \$15,000 in funds owed to Hall by Community Renewal Team of Greater Hartford, Inc. ("Community"). On December 17, 1974 Community was served with a writ of garnishment by a deputy sheriff. At that time Community owed Hall \$6,066.15.

HPC obtained judgment against Hall on January 31, 1975, (Tierney, J.) in the amount of \$15,705.02 damages and \$143.30 costs. An execution for such sums issued on February 19, 1975, at the expiration of the statutory 20 day appeal period, and was sent to a Hartford County deputy sheriff for service on Community.

Also, on February 19, 1975, and without the knowledge of HPC, Community transferred its funds owed to Hall, amounting to at least \$6,066.15, to an account with Connecticut Bank and Trust Company ("CBT") entitled "Thomas H. Hall Associates, Creditors' Account."

On March 4, 1975 and on March 7, 1975 the deputy sheriff who was given the execution made demand upon Community, well within 60 days following judgment. He was told to contact Community's attorney, then on vacation. When on March 25, 1975 he was able to contact the attorney, he was informed that the funds had been levied upon by the Internal Revenue Service, as set forth above.

The priorities in this situation are governed by §6323(a) of the Internal Revenue Code. As until March 6, 1975 no notice had been filed with the proper recording officer, if HPC had perfected a judgment lien prior to that date upon the \$6,066.15 - it had previously garnished from Community, HPC would be entitled to the funds, the levy would have been wrongful, and a return of that amount would be in order under §6343(b)(2) of the Internal Revenue Code.

WOFSEY, ROSEN, KWESKIN & KURIANSKY

District Director
Internal Revenue Service
June 13, 1975
Page Three

As the deputy sheriff first made demand upon Community on March 5, 1975, one day before the filing of the Notice of Tax Lien, it would appear that HPC is entitled to priority under §6323(a). Indeed, we would suggest that HPC became a "judgment lien creditor" of Hall on January 31, 1975, when judgment was entered against Hall and in favor of HPC. There was a lien upon the specific property by virtue of the writ of garnishment, the amount was certain and the lien was no longer on any contingency.

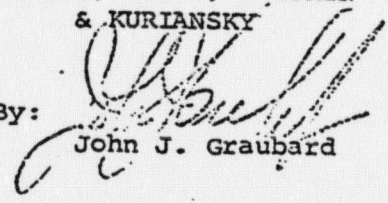
For your assistance in evaluating this claim we are transmitting herewith copies of (1) the writ of garnishment served upon Community, and sheriff's return, (2) the judgment obtained by HPC against Hall, (3) the execution issued against Hall and served upon Community and (4) the sheriff's return on that execution.

For the foregoing reasons we respectfully submit that the foregoing claim should be allowed.

Very truly yours,

WOFSEY, ROSEN, KWESKIN
& KURIANSKY

By:


John J. Graubard

JJG/gk.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THE HARTFORD PROVISION
COMPANY

V.

THE UNITED STATES OF AMERICA

CIVIL NO. B-76-89

[Filed July 5, 1977]

MEMORANDUM OF DECISION
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This is an action for recovery of \$6,066 alleged to have been wrongfully levied upon by the defendant. 26 U.S.C. § 7426; 28 U.S.C. § 1346(e). Cross-motions for summary judgment have been filed, and both parties have agreed upon a stipulation of the facts necessary for decision. There being no genuine issue as to any material fact, summary judgment is appropriate. Fed. R. Civ. P. 56.

On December 12, 1975, the plaintiff, The Hartford Provision Company (Provision), obtained an order from a judge of the Superior Court permitting Provision to garnish the goods, effects, and estate of Thomas R. Hall Associates, Inc. (Hall) held by the Community Renewal Team of Greater Hartford, Inc. (CRT). The writ of garnishment was served on CRT on December 17, 1974. On that date, CRT was indebted to Hall in the amount of \$6,066.16.

On January 31, 1975, Provision obtained a judgment against Hall in the Superior Court in the amount of \$15,705.02, plus costs of \$143.40. Also on January 31, 1975, CRT

established an account with the Connecticut Bank and Trust Company designated as the "CRT-Thomas Hall Associates Creditors Account." CRT deposited the amount of \$6,066.26 in this account, the amount owed by CRT to Hall.

On February 24, 1975, the Internal Revenue Service (IRS) made an assessment against Hall in the amount of \$6,889.21, representing withholding and social security taxes due from Hall for the third quarter of 1974. On March 6, 1975, notice of the federal tax lien was filed with the Secretary of the State of Connecticut and with the Town Clerk, Bloomfield, Connecticut.

On March 4 and March 7, 1975, Provision unsuccessfully sought to serve on CRT a writ of execution issued by the Superior Court on February 19, 1975, in order to have the funds owed by CRT to Hall paid over to Provision in partial satisfaction of the judgment Provision had obtained against Hall. Service of the writ of execution was not made until March 25, 1975. On March 7, 1975, however, three weeks prior to service of Provision's writ of execution, the IRS served a notice of levy on the Connecticut Bank and Trust Company, seeking to have the funds held in the CRT-Thomas Hall Associates Creditors account paid over to the IRS in satisfaction of the tax assessment made against Hall. In response to the notice of levy, the Connecticut Bank and Trust Company paid over to the IRS \$6,066.00, by check dated March 13, 1975. Provision requested that the IRS pay the funds over to it on the ground that its claim to the funds

was superior. The IRS refused this request.

Section 6323(a) of the Internal Revenue Code provides that a creditor who has obtained the status of a "judgment lien creditor" prior to the filing of the federal tax lien shall have priority over an unfiled tax lien created by § 6321. Since it is undisputed that the IRS did not file its tax lien until March 6, 1975, the question is whether Provision was a "judgment lien creditor," within the meaning of 26 U.S.C. § 6323(a), on that date.

Although the term "judgment lien creditor" is not defined by the terms of § 6323, it is well-settled that choate state-created liens take priority over later federal tax liens, United States v. New Britain, 347 U.S. 81 (1954); Crest Finance Co. v. United States, 368 U.S. 347 (1961), while inchoate liens do not. See United States v. Liverpool & London Ins. Co., 348 U.S. 215 (1955); United States v. Scovill, 348 U.S. 218 (1955). The federal rule is that liens are "perfected in the sense that there is nothing more to be done to have a choate lien -- when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." United States v. New Britain, *supra* at 84. Hence, if Provision's lien was choate before March 6, 1975, then it enjoys the status of a judgment lien creditor with a superior claim as against the IRS lien filed on that date.

In this case, the identity of the lienor, and the specific property subject to the lien, were clearly established prior to March 6, 1975. Provision began legal

proceedings to secure the funds to which it was entitled nearly three months before the federal tax lien was filed. The writ of garnishment obtained by Provision was served on CRT on December 17, 1974. The property subject to the lien was actually segregated from other property in the possession of CRT on January 31, 1975, when the CRT-Thomas Hall Associates Creditors account was opened. Whatever uncertainty existed with regard to the amount of the lien was resolved when Provision obtained a judgment against Hall in an amount exceeding the sum owed to Hall by CRT. Compare United States v. Security Trust & Savings, 340 U.S. 47 (1950).

The Government contends that the tax lien has priority on the ground that under Connecticut law an attachment lien is not perfected until proper service of a writ of execution is made. The Government relies on Conn. Gen. Stat. § 52-328 and Bradbury v. Wodjenski, 159 Conn. 366 (1970). This reliance is misplaced. The Connecticut statute, as its title states, concerns the duration of an attachment lien after judgment, requiring execution to be levied within sixty days of judgment to maintain validity of the lien. It does not illumine the issue before this Court, i.e., at what point is an attachment lien sufficiently choate to confer judgment lien creditor status, within the meaning of 26 U.S.C. § 6323(a), upon a lienor.

I am satisfied that Provision's lien meets the federal choateness standard set out in United States v. New Britain, supra. The identity of the lienor, the property,

and the amount of the lien were all established at least by January 31, 1975, when Provision obtained the judgment against Hall. At that point, Provision's lien was choate, and superior to the federal tax lien, which was filed more than one month later.

Therefore, according to the provisions of 26 U.S.C. § 7426, judgment may enter for the plaintiff in the amount of \$6,066.00, and defendant is hereby ORDERED to return that amount to plaintiff, with interest calculated at six per cent per annum from March 13, 1975, to the date of payment of this judgment.

Dated at Hartford, Connecticut, this 30 day of June, 1977.

Jon O. Newman
Jon O. Newman
United States District Judge

FILED

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JUL 3 2 36 PM '77

CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN.

THE HARTFORD PROVISION COMPANY :

VS. :

THE UNITED STATES OF AMERICA :

CIVIL NO. B-76-89

[Filed July 5, 1977]

J U D G M E N T

THIS CAUSE HAVING COME ON FOR CONSIDERATION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND THE COURT HAVING FILED ITS MEMORANDUM OF DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT UNDER DATE OF JULY 5, 1977, GRANTING THE PLAINTIFF'S MOTION AND DENYING THE DEFENDANT'S MOTION.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED THAT JUDGMENT BE AND IS HEREBY ENTERED IN FAVOR OF THE PLAINTIFF IN THE AMOUNT OF \$6,066.00 WITH INTEREST CALCULATED AT SIX PERCENT PER ANNUM FROM MARCH 13, 1975 TO THE DATE OF PAYMENT OF THIS JUDGMENT.

DATED AT BRIDGEPORT, CONNECTICUT, THIS 5TH DAY OF JULY, 1977.

SYLVESTER A. MARKOWSKI, CLERK

BY

Vincent R. De Rosa

VINCENT R. DEROSA
DEPUTY IN CHARGE

CERTIFICATE OF SERVICE

It is hereby certified that service of this appendix has been made on opposing counsel by mailing a copy thereof on this _____ day of November, 1977, in an envelope, with postage prepaid, properly addressed to him as follows:

John J. Graubard, Esquire
Wofsey, Rosen, Kweskin &
Kuriansky
777 Summer Street
Stamford, Connecticut 06901

GILBERT E. ANDREWS,
Attorney.